IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2006-0090
	DEPARTMENT A
GARY JAMES BURRIS,	
	MEMORANDUM DECISION
Respondent/Appellant,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
STACY ANN CROM (fka BURRIS),	
Petitioner/Appellee.	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. DO1994-0145

Honorable Peter J. Cahill, Judge

AFFIRMED

Payson Law Center
By Harlan W. Green — Payson
Attorney for Respondent/Appellant

Stacy Ann Crom — Payson
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 Appellant Gary Burris appeals from the trial court's denial of his motion for new trial in this child support proceeding. He argues the trial court abused its discretion in

denying his motion because he had presented new evidence meriting a new trial and because the court erred in refusing to impute income to his former wife, appellee Stacy Ann Crom. Finding no abuse of discretion in the trial court's ruling, we affirm.

BACKGROUND

¶2 On appeal from the denial of a motion for new trial, "we consider all conflicting evidence in the light most favorable to the appellee, and all competent evidence supporting the judgment will be taken as true." *Hibbitts v. Walter Jacoby & Sons*, 9 Ariz. App. 486, 487, 453 P.2d 997, 998 (1969). Gary and Stacy were married in 1990 and divorced in 1995. The couple had two minor children. Stacy has remarried. In September 2003, Stacy moved to modify child support, and Gary requested a hearing on the motion, alleging "[t]he information provided on the Parent's Worksheet that was the basis for the Request . . . [wa]s not accurate."

¶3 In June 2005, the trial court held a hearing on child support issues, including Gary's argument that the court should attribute some of Stacy's current spouse's income to her. In an unsigned minute entry, the trial court "decline[d] to attribute income as to [Stacy]."[1] In September 2005, Gary filed a motion for new trial pursuant to Rule 59, Ariz. R. Civ. P., 16 A.R.S., Pt. 2.

¶4 Thereafter, on October 18, 2005, the trial court issued a child support order "establishing credit for [Gary] for overpayment of spousal maintenance payments" and

[1]In his briefs, Gary also discusses the children's "tutoring with Sylvan Learning Centers" and the fact that "the Trial Court [wa]s inclined" "to pass this expense onto [him]." But Stacy voluntarily withdrew the request for tutoring and agreed to pay for it herself.

ordering him to pay approximately $1,200 per month in child support and giving him credit for past overpayments of approximately $8,400. Stacy moved to vacate that order, maintaining that the "credit for an alleged over-payment of spousal maintenance [wa]s not a matter which ha[d] ever before been raised during the course of the instant litigation." The trial court denied Gary's motion for new trial and vacated the October 18 order, finding it had been "signed prematurely without giving [Stacy] a chance to object." Gary then appealed from the trial court's decision "regarding [his] [m]otion for [n]ew trial."[2]

DISCUSSION

¶5 Gary argues the trial court "abuse[d] its discretion in denying [his] motion for a new trial" and in failing "to impute income" to Stacy.[3] When a party appeals from the denial of a motion for new trial based on newly discovered evidence under Rule 59(a)(4),

---

[2]Gary appealed from the trial court's unsigned minute entry ruling, an unappealable order. But the court subsequently entered a signed version of that order. Thus, although Gary's notice of appeal was premature, we have jurisdiction of the matter. *See* Ariz. R. Civ App. P. 9(a), 17B A.R.S.; *Barassi v. Matison*, 130 Ariz. 418, 421, 636 P.2d 1200, 1203 (1981).

Additionally, in her answering brief, Stacy argues "[t]his is not a proper appeal" because Gary's motion for new trial was filed before the signed judgment. But Gary filed his motion after the trial court's minute entry ruling "declin[ing] to attribute income as to [Stacy]" and "not later than 15 days after entry of the judgment." Ariz. R. Civ. P. 59(d), 16 A.R.S., Pt. 2. Thus, the motion was timely. *See Dunahay v. Struzik*, 96 Ariz. 246, 249, 393 P.2d 930, 933 (1964) ("[M]otion for new trial can be granted when filed after verdict and before judgment.").

[3]We note that Gary moved below for new trial under Rule 59, Ariz. R. Civ. P., but the motion actually followed an evidentiary hearing, not a trial. Although "[n]o provision for a motion for rehearing is contained in Rule 59," our supreme court has stated it would "treat [such a] matter as the denial of a motion for new trial," and we likewise do so here. *Black v. Black*, 114 Ariz. 282, 285, 560 P.2d 800, 803 (1977).

Ariz. R. Civ. P., and "fail[s] to appeal from the judgment[,] . . . our jurisdiction . . . is limited to a review of the trial court's order denying the motion for new trial." *Wendling v. Sw. Sav. & Loan Ass'n*, 143 Ariz. 599, 602, 694 P.2d 1213, 1216 (App. 1984). Thus, because Gary only appealed from the trial court's order denying his motion for new trial, we consider only whether the trial court abused its discretion in denying that motion. *See Roberts v. Morgensen Motors*, 135 Ariz. 162, 165, 659 P.2d 1307, 1310 (App. 1982) ("The grant or denial of the motion for a new trial is within the sound discretion of the trial court and we will not upset its ruling absent a clear showing of abuse of discretion.").

¶6 Gary's motion for new trial below cited several items of "newly discovered" evidence, including "non-disclosed income," the trial court's refusal to impute income to Stacy, Stacy's monthly expense disclosure, certain stock assets that Gary claimed Stacy "and her husband . . . receive[] . . . as indirect compensation," and various forms of community property income. On appeal, however, he mainly argues that he "well documented [Stacy's] 'stock' holdings and unreported income" and that the trial court "never connected [Stacy's] financial affidavit . . . to the Motion for a New Trial." This unreported income, he alleges, was "a serious violation of disclosure requirements."

¶7 We first note that, although Gary alleged below that he had discovered Stacy's current husband had various undisclosed sources of income, he did not move to compel discovery under Rule 37(a), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, or for sanctions under Rule 37(b), Ariz. R. Civ. P. Therefore, to the extent we understand his argument as ascribing error to the trial court's having not ordered further discovery or having imposed some sort

of penalty for discovery abuses, the argument is waived. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 15, 99 P.3d 1030, 1035 (App. 2004) ("[A]rguments raised for first time on appeal are untimely and, therefore, deemed waived."). Likewise, because the record does not show that Gary made any evidentiary objections on this point or argued below that the trial court erred "in the admission or rejection of evidence," or committed "other errors of law . . . at the trial or during the progress of the action," we also reject as waived his argument under Rule 59(a)(6).[4] *See Orfaly*, 209 Ariz. 260, ¶ 15, 99 P.3d at 1035.

¶8 Next, we address Gary's argument that the newly discovered evidence presented in his motion merited a new trial. "In order to grant a motion on the grounds of 'newly discovered' evidence, it must appear to the trial court that such evidence would probably change the result upon rehearing and that it could not have been discovered before the trial by the exercise of due diligence." *Black v. Black*, 114 Ariz. 282, 285, 560 P.2d 800, 803 (1977). As Stacy points out, some of what Gary raised in his motion for new trial was evidence presented at or before the hearing and already before the trial court. This includes his discussion of Stacy's financial affidavit, expenses, and tax forms. And, evidence that "was in possession of the party before the judgment was rendered . . . is not newly discovered and does not entitle him to relief." *Roberts*, 135 Ariz. at 165, 659 P.2d at 1310.

¶9 The remaining, purported new evidence on which Gary relies largely consists of the stock and business interests of Stacy's current husband. Gary created several tables

[4]In his brief, Gary actually cites Rule 59(6), but because no such rule exists, we assume he is referring to Rule 59(a)(6), Ariz. R. Civ. P., 16 A.R.S., Pt. 2.

showing these interests, apparently derived from a search of public records, which he attached as exhibits to his motion for new trial. Under Rule 59(a)(4), Ariz. R. Civ. P., evidence that "could have been discovered before trial by the exercise of due diligence" does not entitle a party to relief. *Roberts*, 135 Ariz. at 165, 659 P.2d at 1310. And, the party seeking to overturn the denial of a motion for new trial has the burden of showing that he or she could not have obtained the evidence through the exercise of due diligence and that the trial court abused its discretion in denying the motion. *See Harris v. Murch*, 18 Ariz. App. 466, 467, 503 P.2d 821, 822 (1972).

¶10 Gary did not explain, in an affidavit or otherwise, why he had been unable to secure the purported new evidence before the hearing. *See Sabin v. Rauch*, 75 Ariz. 275, 281, 255 P.2d 206, 209 (1953) ("[An] affidavit must show not only that the defendant did not know of the evidence relied upon but must also show that diligence was used in an effort to discover the same."), *citing Sharpensteen v. Sanguinetti*, 33 Ariz. 110, 114, 262 P. 609, 610 (1928). On this record, the trial court could have concluded that, through the exercise of due diligence, Gary could have discovered this information, which was apparently readily available in public records, in the nearly two years between the motion for modification of child support and the June 2005 hearing. *See Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990) (relief not merited due to lack of due diligence when "identity of both witnesses furnishing . . . allegedly newly discovered evidence . . . known to plaintiffs before the entry of summary judgment"). Thus, we agree with Stacy that Gary failed to show why he "could not have discovered this information at

some time before the June 8, 2005 [h]earing." Additionally, at the hearing, Gary's counsel discussed the fact that at that point they had already discovered stock dividends from "the corporation that's operated by [Stacy's current husband]." Therefore, we find no abuse of discretion in the trial court's implicit finding that the evidence Gary presented in his motion was not "newly discovered" for purposes of Rule 59(a)(4). *See In re CVR 1997 Irrevocable Trust*, 202 Ariz. 174, ¶ 16, 42 P.3d 605, 608 (App. 2002) ("[W]e presume that the trial court found every fact necessary to sustain its ruling and will affirm if any reasonable construction of the evidence supports its decision.").

¶11 Even had the evidence qualified as such, however, the trial court also could have concluded that it would not have changed the result of the hearing. As Gary correctly points out, "[t]he stock accumulated by [Stacy and her current husband] while married is a community asset per A.R.S. § 25-211." But the law is clear that the "'[i]ncome of a parent's new spouse is not treated as income of that parent.'" *In re Marriage of Pacific*, 168 Ariz. 460, 463 n.3, 815 P.2d 7, 10 n.3 (App. 1991), *quoting* Ariz. Child Support Guidelines 5(F). Thus, the trial court would have erred in imputing Stacy's current husband's income to her for child support purposes. Therefore, the trial court did not abuse its discretion in implicitly concluding that Gary's purported new evidence would not have affected the its ruling.

¶12 Similarly, to the extent any of the alleged new evidence would support the argument that the trial court should have imputed income to Stacy separate from her current husband's income, the trial court did not err in rejecting that argument as well. Citing

A.R.S. § 25-511, Gary asserts the trial court was "mandated to impute income to parents." But that statute provides that, "[o]n a showing of previous employment or lack of a physical or mental disability precluding employment, the trier of fact *may* infer that [a parent] is capable of full-time employment at least at the federal adult minimum wage." § 25-511(C) (emphasis added). Likewise, section 5(E) the Arizona Child Support Guidelines provides that "if earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a parent up to his or her earning capacity." Thus, it is within a trial court's discretion to impute wages to a non-working parent when appropriate.[5]

¶13 The record shows that Stacy has a child with a disability that requires substantial attention.[6] In section 5(E)(3), the Arizona Child Support Guidelines provide that

---

[5]Without citing any legal authority, *see* Rule 13(a)(6), Ariz. R. Civ. App. P., 17B A.R.S., Gary also alleges the trial court erred because it "expressed its dislike for the legal action of imputed income" when it stated at the hearing: "I don't like that legal fix." But, the trial court made that statement after hearing argument at the hearing and with substantial familiarity with the case at bar. We therefore do not agree with Gary's apparent interpretation of the statement as meaning the trial court had a general bias or disagreement with the Child Support Guidelines on this point.

[6]In his reply brief, Gary argues "th[e] issue [of Stacy's disabled child] was raised in Court, with no testimony, no doctor's reports of any evidence that the 'Erbs Palsy' is a disability to the . . . child." At the hearing, Gary did object to the lack of "medical proof that th[e] child is getting therapy every day," but conceded that "[t]here [wa]s evidence the child was taken . . . once or twice a month to see a doctor," and thereby at least implicitly conceded the child had a disability. Generally, arguments raised for the first time in a reply brief are waived. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005). And, in any event, Gary has failed to show how his purported new evidence would contradict the trial court's implicit finding that Stacy's child, whom he admitted below was disabled, had "physical needs . . . requir[ing her] presence in the home." Ariz. Child Support Guidelines 5(E)(3); *see also In re Niky R.*, 203 Ariz. 387, ¶ 21, 55 P.3d 81, 86 (App. 2002) ("'[T]he trial court will be *deemed to have made every finding necessary*

"it may be inappropriate to attribute income" to a parent when "[u]nusual emotional or physical needs of a natural or adopted child require that parent's presence in the home." Thus, we cannot say the trial court abused its discretion in following the guidelines and refusing to impute income to Stacy. None of the evidence that Gary now relies on clearly would have changed that result. In sum, we cannot say the trial court abused its discretion in denying Gary's motion for a new trial.

¶14 In passing, Gary also asserts that "the Trial Court further abused its discretion by sanctioning [him] and awarding $300.00 in attorney's fees" to Stacy. He did not properly develop this argument or cite any legal authority to support his position. Therefore, we decline to address the issue. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S.; *see also Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 226 n.10, 895 P.2d 133, 138 n.10 (App. 1994).

¶15 Finally, Stacy has requested "legal fees," costs, and sanctions on appeal. Because she appears in propria persona on appeal and has not cited any law in support of her request, we deny any request for attorney fees or sanctions. *See* Ariz. R. Civ. App. P. 21(c), 17B A.R.S.; *In re Wilcox Revocable Trust*, 192 Ariz. 337, ¶ 21, 965 P.2d 71, 75 (App. 1998) ("We will award no attorney's fees where no basis for the award is cited to us."); *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983) ("[A] party who represents h[er]self in litigation has no right to be compensated by the

---

to support the judgment.'"), *quoting Maricopa County Juv. Action No. JS-3594*, 133 Ariz. 582, 585, 653 P.2d 39, 42 (App. 1982) (emphasis in *Niky*).

payment of attorneys' fees because of the absence of an attorney-client relationship."). As the prevailing party on appeal, however, she is entitled to an award of taxable costs upon her compliance with Rule 21(a), Ariz. R. Civ. App. P., 17B A.R.S. *See* A.R.S. §§ 12-331, 12-341.

DISPOSITION

¶16 The trial court's order denying Gary's motion for a new trial is affirmed.

_____
JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

_____
GARYE L. VÁSQUEZ, Judge